

<b>San-Dar Assoc. v Fried</b>
2014 NY Slip Op 30155(U)
January 17, 2014
Supreme Court, New York County
Docket Number: 150850/2012
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 150850/2012
SAN-DAR ASSOCIATES
vs.
FRIED, JACQUELINE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to 6, were read on this motion to/for dismiss/amend
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits (+memo) No(s) 1, 2
Answering Affidavits -- Exhibits No(s)
Replying Affidavits No(s) 5, 6
Notice of Cross-motion etc + memo 3, 4

Upon the foregoing papers, it is ordered that this motion is by plaintiffs to, inter alia,
dismiss defendants' second Amended Answer & second
Amended Affirmative Defenses/Counterclaims and
defendants' cross-motion to serve an Amended
Answer with third-Amended Affirmative Defenses/
Counterclaims are decided in accordance
with the attached memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/17/14

[Signature], J.S.C.

JUSTICE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED [ ] NON-FINAL DISPOSITION [x]
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER [ ]
3. CHECK IF APPROPRIATE: SETTLE ORDER [ ] SUBMIT ORDER [ ]
DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE [ ]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
SAN-DAR ASSOCIATES and S&M 52<sup>nd</sup> FEE, LLC,  
Plaintiffs,

Index No.: 150850/12  
DECISION/ORDER

-against-

Motion Seq. No.: 002

JACQUELINE FRIED and RIVER 52, LLC,  
Defendants.  
-----X

**HON. DORIS LING-COHAN, J.S.C.:**

In this real property action, plaintiffs San-Dar Associates (San-Dar) and S&M 52nd Fee, LLC (S&M) move for an order, *inter alia*, dismissing defendants' amended answer with second amended affirmative defenses and second amended counterclaims, and also to cancel a notice of pendency. Defendants Jacqueline Fried (Fried) and River 52, LLC (River 52) cross-move for leave to serve an amended answer with third amended affirmative defenses and third amended counterclaims. For the following reasons, plaintiffs' motion is granted and defendant's cross motion is denied.

**BACKGROUND**

The court discussed the facts of this case at length in a prior decision dated December 7, 2012 (motion sequence number 001). However, it is noted that, this action centers around two buildings located in the County, City and State of New York. The first, located at 429 East 52nd Street (the 429 building) is owned by S&M, and San-Dar is its current net lessee. *See* Memorandum of Law in Support of Motion, at 2. The adjacent building, located at 425 East 52nd Street (the 425 building), is currently owned by River 52, and was formerly owned by

Fried. *Id.* In its order dated December 12, 2012, this court granted defendants' prior motion to dismiss the complaint, on the ground that plaintiff San-Dar had not included S&M as a necessary party, but granted San-Dar leave to serve and file an amended complaint.

On December 18, 2012, in accordance with this court's December 12, 2012 order, plaintiffs served an amended complaint, asserting causes of action for: 1) a declaratory judgment with injunctive relief; and 2) money damages in an amount to be ascertained. *See* Notice of Motion, Exhibit A. Defendants filed their initial answer with affirmative defenses and counterclaims to the amended complaint on February 13, 2013. Thereafter, on February 20, 2013, defendants filed an amended answer with amended affirmative defenses and amended counterclaims. *Id.*; Exhibits D, F. Plaintiffs filed a reply to defendants' amended answer on March 12, 2013. *Id.*; Exhibit G. In response, on March 23, 2013, defendants filed another amended answer with second amended affirmative defenses and second amended counterclaims. *Id.*; Exhibit H. Defendants' second amended affirmative defenses include that: 1) the amended complaint fails to state a cause of action; 2) the New York City Department of Buildings (DOB) has primary jurisdiction over the subject matter of this action; 3) this action is an improper collateral attack on the 425 building's certificate of occupancy (C of O); and 4) plaintiffs lack standing to commence this action. The second amended counterclaims include: 1) slander of title; 2) specific performance; 3) breach of contract; and 4) declaratory judgment. *Id.* On March 25, 2013, defendants also filed a notice of pendency against plaintiffs, with respect to the 429 building. *Id.*; Exhibit I.

Plaintiffs initially responded to defendants' amended answer with second amended affirmative defenses and second amended counterclaims, with a written demand that defendants withdraw both their amended answer with second amended affirmative defenses and second amended counterclaims and the notice of pendency. *Id.*; Exhibit J. Defendants failed to withdraw their second amended answer and, thus, plaintiffs filed the within motion, for an order, *inter alia*, dismissing defendants' amended answer with second amended affirmative defenses and second amended counterclaims, and also to cancel the notice of pendency filed by defendants. In response to plaintiffs' motion, defendants cross-moved for leave to serve and file an amended answer with third amended affirmative defenses and third amended counterclaims. *See* Notice of Cross Motion, Exhibit 1. Defendants' third amended affirmative defenses include that: 1) the amended complaint fails to state a cause of action; 2) the DOB has primary jurisdiction; 3) this action is an improper collateral attack on the 425 building's Certificate of Occupancy; 4) plaintiffs lack standing to commence this action; and 5) trespass by encroachment. Defendants' third amended counterclaims include: 1) slander of title; 2) specific performance; 3) breach of contract for services; 4) declaratory judgment; 5) trespass by encroachment; 6) breach of contract by trespass; and 7) trespass by water penetration. *Id.*

#### DISCUSSION

The first branch of plaintiffs' motion seeks dismissal of defendants' amended answer with second amended affirmative defenses and second amended counterclaims on the ground that defendants failed to seek leave of the court to serve such second amended answer, in violation of CPLR 3025 (a). *See* Memorandum of Law in Support of Motion, at 7-8. As detailed below, plaintiffs are correct.

CPLR 3025(a) provides as follows:

“Amendments without leave. A party may amend his pleading *once* without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.”

(emphasis supplied). Here, it is undisputed that defendants failed to seek leave of the court, before they served their second amended answer with second amended affirmative defenses and second amended counterclaims on plaintiffs. Significantly, it is noted that CPLR 3025(a), explicitly indicates that “[a] party may amend his pleading *once* without leave of court”. *See also* Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3025:1. Thus, defendants’ second amended answer is deemed improper and plaintiffs’ motion to dismiss such second amended answer is granted. Moreover, as the notice of pendency was filed based upon the fourth counterclaim in defendants’ second amended answer which has been dismissed, plaintiffs’ motion to cancel the notice of pendency is also granted.

Defendants’ cross-motion, which seeks leave of this court to serve and file an amended answer with third amended affirmative defenses and third amended counterclaims, pursuant to CPLR 3025(b), is denied, as detailed below.

CPLR 3025(b) provides as follows:

“(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, o transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

Additionally, as the Appellate Division, First Department, has repeatedly held, while:

“[l]eave to amend a pleading should be ‘freely given’ (CPLR 3025[b] ) ‘as a matter of discretion in the absence of prejudice or surprise,’ ...to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Therefore, a motion for leave to amend a pleading ‘must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.’”

*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 (1<sup>st</sup> Dept 2005) (internal citations omitted); *see also Greentech Research LLC v Wissman*, 104 AD3d 540, 541 (1<sup>st</sup> Dept 2013).

Here, defendants’ cross motion is not supported by an affidavit of merit or evidentiary proof, as required.; nor is their proposed answer with third affirmative defenses and counterclaims verified by someone with personal knowledge of the facts. Thus, defendants papers are defective and insufficient to support their proposed amendment to the answer. Therefore, the court is constrained to deny defendants’ cross-motion seeking leave of the court to serve their third amended answer.

As this case involves neighboring buildings, the court continues to encourage an amicable settlement. As stated by President Abraham Lincoln:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Abraham Lincoln, Notes for a Law Lecture, July 1850,

<http://showcase.netins.net/web/creative/lincoln/speeches/quotes.htm>.

## DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3025, 3211, 6501 and 6514, of plaintiffs San-Dar Associates and S&M 52nd Fee, LLC is granted and defendants second amended answer is deemed dismissed; and it is further

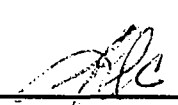
ORDERED that, upon proof of service of a copy of this order with notice of entry upon defendants, in accordance with CPLR 6514(a), the Clerk of New York County is directed to cancel the notice of pendency, dated March 25, 2013 filed by defendants with respect to the real property known and located at 429 East 52<sup>nd</sup> Street, New York, NY (Exhibit I, Notice of Motion); and it is further

ORDERED that the cross motion, pursuant to CPLR 3025, of defendants Jacqueline Fried and River 52, LLC is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiffs shall serve a copy upon defendants, with notice of entry.

Dated: New York, New York

January 17 2014

  
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Hon. Doris Ling-Cohan, J.S.C.

J:\Amend\sandar associates deny motion to amend answer to affidavit of merit.wpd